83-969

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

NO._____

MILTON LUBIN,
Petitioner,

V.

CRITTENDEN HOSPITAL ASSOCIATION, A CORPORATION, R. F. SCRUGGS, HUGH B. CHALMERS, J. F. RIEVES, JR., H. G. LANFORD, M.D., E. W. BIGGER, JR., JOHN H. GOE, RALPH HILL, C. E. MORRISON, JR., SAM C. HUDSON, N. S. SECHREST, BILLY WOOD, AND MRS. MARY ARNOLD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ALAN BRYANT CHAMBERS
Attorney for Petitioner
147 Jefferson Avenue
Memphis, Tennessee 38103
901-525-4297

N. ALAN LUBIN
Attorney for Petitioner
140 Jefferson Avenue
Memphis, Tennessee 38103
901-525-4297

I.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Eight Circuit Court of Appeals erred in affirming the District Court's denial of Federal jurisdiction wherein the District Court held that there was an insufficient nexus of activity to constitute State action.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

NO._____

MILTON LUBIN,
Petitioner,

V.

CRITTENDEN HOSPITAL ASSOCIATION, A CORPORATION, R. F. SCRUGGS, HUGH B. CHALMERS, J. F. RIEVES, JR., H. G. LANFORD, M.D., E. W. BIGGER, JR., JOHN H. GOE, RALPH HILL, C. E. MORRISON, JR., SAM C. HUDSON, N. S. SECHREST, BILLY WOOD, AND MRS. MARY ARNOLD,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Comes now Petitioner, Milton Lubin, M.D., and petitions the Supreme Court of the United States to issue the Writ of Certiorari to review a decision of the United States Court of Appeals, and in support thereof would show unto the Court as follows:

II.

PARTIES

The Petitioner is Milton Lubin, M.D. Petitioner was the Plaintiff in an action filed in the United States District Court for the Eastern District of Arkansas, Jonesboro Division, which action was brought pursuant to 42 U.S.C. Section 1983 in connection with 28 U.S.C. Section 1343(3) alleging that Petitioner was denied rights secured to him by the Fourteenth Amendment to the United States Constitution.

Respondents, Crittenden Hospital Association, a corporation, and R. F. Scruggs, Hugh B. Chalmers, J. F. Rieves, Jr., H. G. Lanford, M.D., E. W. Bigger, Jr., John H. Goe, Ralph Hill, C. E. Morrison, Jr., Sam C. Hudson, N. S. Sechrest, Billy Wood, and Mrs. Mary Arnold, were the Defendants in the action filed in the District Court by Petitioner. All of the above mentioned individuals are members of the Board of Trustees of the Respondent, Crittenden Hospital Association, a corporation, and the

hospital in which the Petitioner practiced medicine and had staff privileges.

III.

TABLE OF CONTENTS

IV.

TABLE OF AUTHORITIES

Federal Cases:

V.

OPINIONS DELIVERED IN COURTS BELOW

Petitioner would show that there are three primary opinions in this cause which have been delivered in the Courts below. On September 20, 1982, the United States District Court for the Eastern District of Arkansas entered an order of dismissal in the original action holding that the District Court lacked subject matter jurisdiction over the matters in controversy.

The second formal opinion issued by a Court below was the formal opinion issued by the United States Court of Appeals for the Eighth Circuit, which opinion was filed in said Court on August 9, 1983 and affirmed the District Court's order of dismissal of September 20, 1982.

The third opinion filed in the Courts below is an opinion of the United States Court of Appeals for the Eighth Circuit denying Petitioner's Petition for Rehearing which was filed on September 16, 1983.

These opinions are attached to this petition and encompassed within the Appendices as Appendices A, B, and C, respectively.

VI.

JURISDICTION

Petitioner, Milton Lubin, M.D., prays for the United States Supreme Court to review the decision of the United States Supreme Court to review the decision of the United States Court of Appeals for the Eighth Circuit filed on August 9, 1983.

Petitioner prayed for a rehearing to the Eighth Circuit Court of Appeals, which rehearing was had, duly considered and denied by the Eighth Circuit on September 16, 1983. Petitioner would further show that he has not prayed for an extension of time to perfect this petition to the United States Supreme Court pursuant to 28 U.S.C. Section 2101(c) and also, there is no cross-petition for the writ of certiorari.

The statutory and/or jurisdictional basis for the bringing of this petition is Rule 17 and Rule 20(2) of the Rules of the Supreme Court of the United States as well as 28 U.S.C. Section 2101(c). This petition is filed within ninety days of the final ruling of the Eight Circuit Court of Appeals.

VII.

CONSTITUTIONAL PROVISIONS AND OTHER APPLICABLE PROVISIONS OF LAW

Petitioner would show that he has been denied constitutional rights secured to him by the Fourteenth Amendment to the Constitution of the United States. Further, the Petitioner would maintain that jurisdiction in the Federal Court was proper under 42 U.S.C. Section 1983 and 28 U.S.C Sectin 1983 and 28 U.S.C. Section 1343(3).

The Fourteenth Amendment as well as 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3) are made Appendices D, E, and F, respectively to this petition.

VIII.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks to review a ruling of the United States Court of Appeals for the Eighth Circuit affirming the dismissal of Petitioner's action by the United States District Court for the Eastern District of Arkansas, Jonesboro Division, which dismissal was predicated upon the District Court's holding that there was not sufficient state action involved to sustain Federal jurisdiction. The Petitioner is Milton Lubin, M.D., who was the Plaintiff in the District Court and will hereinafter be referred to as "Petitioner." The Respondents are Crittenden Hospital Association, a corporation, R. F. Scruggs, Hugh B. Chalmers, J. F. Rieves, Jr., H. G. Lanford, M.D., E. W. Bigger, Jr., John H. Goe, Ralph Hill, C. E. Morrison, Jr., Sam C. Hudson, N. S. Sechrest, Billy Wood, and Mrs. Mary Arnold, who were the Defendants in the District Court and who will hereinafter be referred to as "Respondents."

A.

Statement of the Facts

Petitioner is a duly licensed physician in the state of Arkansas who has been practicing medicine since October 1, 1953. Petitioner at all times material was on the staff of Crittenden Memorial Hospital, operated by Crittenden Hospital Association, an Arkansas non-profit corporation. The hospital and its assets belong to Crittenden County, Arkansas and was leased to the Crittenden Hospital Association pursuant to written lease.

The Crittenden Hospital Association's Executive Committee found Petitioner guilty of such conduct it deemed to be detrimental to the wellbeing of the Hospital, and disciplined the Petitioner by placing him on probation for a one (1) year period. Thereafter, the Petitioner appealed the action of the Executive Committee to the Board of Trustees of the Crittenden Hospital Association, who by ruling of May 1, 1981 upheld the actions of the Executive Committee.

It was asserted by the Petitioner and admitted by the Respondents in the District Court that the hospital received substantial funds under the Hill-Burton Act, i.e., Federal Hospital Survey and Construction Act, Medicare, Medicaid, and other Federal funds; it further received gifts and grants from the residents of Crittenden County, Arkansas, as well as from the State of Arkansas and the Federal government; real property owners in Crittenden County, Arkansas were assessed and paid a one (1) mill tax on the assessed value of their property, which funds inured to the benefit of the Crittenden Memorial Hospital; Crittenden County, Arkansas owned the land and improvements together with the hospital equipment used in the operation of the hospital; and Crittenden County, Arkansas financed, through a bond issue, the improvements on the leased property. Furthermore, pursuant to the lease, the Crittenden Hospital Association must account monthly by written report to the County Judge, an elected County official.

The District Court, after consideration of the admitted facts, found that said facts were not sufficient to sustain Petitioner's claim of the requisite "State action" necessary to support Federal jurisdiction and dismissed Petitioner's complaint. The Court of Appeals followed the reasoning of the District Court in affirming the dismissal of the Petitioner's complaint.

IX.

REASONS FOR THE ISSUANCE OF THE WRIT

Petitioner would show that the writ of certiorari should be allowed pursuant to the considerations set out in Rule 17(a) and (c) of the Rules of the Supreme Court of the United States. Petitioner maintains that both the District Court and the Court of Appeals for the Eighth Circuit have decided a most important question of Federal law which should be settled by this Court, and further, have rendered a decision in direct conflict with another Federal Court of Appeals on basically the same matter.

Petitioner contends that the United States District Court has subject matter jurisdiction pursuant to 28 U.S.C. Section 1343 where in his complaint Petitioner alleged sufficient grounds to substantiate a cause of action under 42 U.S.C. Section 1983 and under the due process clause of the Fourteenth Amendment to the United States Constitution. Furthermore, in order to maintain his claim in Federal Court under the above-mentioned provisions, Petitioner would have had to have shown that Respondents acted under color of law or that their actions constituted State action.

Clearly, it would have to be determined that the actions of the Respondents in placing the Petitioner on probation amounted to State action in order to state a cause of action under 42 U.S.C. Section 1983. Both the District Court and Court of Appeals for the Eighth Circuit upheld that the requisite State action was not present. In so doing, both Courts relied on one of two major lines of authority which have evolved from two leading cases of this Court,

namely, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

The Eighth Circuit Court of Appeals in following Jackson v. Metropolitan Edison Co., supra, found not sufficient nexus between the disciplinary action of the hospital and the State's regulation. Had the Court of Appeals followed the holding in Burton v. Wilmington Parking Authority, supra, it would have easily found that a symbiotic relationship existed between the Respondents and government sufficient to provide a basis for finding State action. Furthermore, the Eighth Circuit, in a very generalized statement in its opinion, incorrectly characterized the symbiotic relationship test of Burton as being "generally limited to cases involving racial discrimination." See opinion of Eighth Circuit Court of Appeals, Appendix B.

Petitioner would further point out to the Court that the Eighth Circuit Court of Appeals, in its opinion, made reference to other circuits

which have ruled in the same manner as the Eighth Circuit regarding claims involving disciplinary actions by private hospitals when it stated in its opinion, the following:

> Virtually every circuit that has considered substantially similar claims involving disciplinary actions by private hospitals has reached the same conclusions as Briscoe. See, e.g., Loh-Seng Yo v. Cibola General Hospital, 706 F.2d 306, 308 (10th Cir. 1983); Modaber v. Culpepper Memorial Hospital, Inc., 674 F2d 1023, 1026 (4th Cir. 1982); Musso v. Suriano, 586 F.2d 59, 62-63 (7th Cir. 1978), cert denied, 440 U.S. 971 (1979); Madry v. Sorel, 588 F.2d 303, 305-06 (5th Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

Petitioner would point out that the Eighth Circuit and the other circuits mentioned above are in direct conflict with other circuits who have addressed similar issues as in this case involving the Petitioner. See O'Neill v Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973); Chalfant v. Wilmington Institute, 574 F.2d 739 (3rd Cir. 1978).

O'Neill v. Grayson County War Memorial Hospital is basically a mirror-image of the instant case. Factually, there is very little difference between the two cases. In both cases, the courts are confronted with hospital disciplinary action of physicians; similar hospital financing, including receipt of funding under the Hill-Burton Act; governmental ownership of the realty and facilities which were leased to hospital corporations and payment of certain funds into governmental coffers in the event of dissolution. Notwithstanding the similarity of both cases, the Eighth and Sixth Circuit Courts of Appeal reached exactly opposite results for which there appears to be no rational or logical justification for same. Petitioner can find no reason for the disproportionate treatment which obviously results from the apparent conflict among the circuits.

Petitioner would assert that this conflict between the circuits in hospital disciplinary cases clearly meets the consideration set forth in Rule 17(a) of the Rules of the Supreme Court

of the United States and, thus, is proper and timely for resolution by this Court. Petitioner would assert that citizens of the various circuits should be afforded the same rights and privileges as all other citizens of all other circuits.

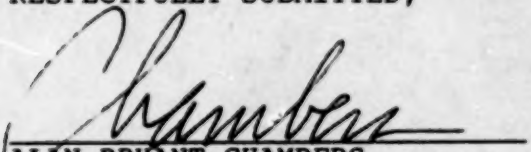
X.

CONCLUSION

For the reasons set out in the foregoing petition, Petitioner, Milton Lubin, M.D., concludes that sufficient state action has been presented, and that the Federal jurisdiction should have been sustained in the Courts below. Furthermore, Petitioner has established that sufficient conflict exists among various circuit Courts of Appeal as hereinabove stated, making timely a need for a just resolution of the apparent conflict.

WHEREFORE, PETITIONER PRAYS that this Honorable Supreme Court grant this Petition for Writ of Certiorari and allow the Petitioner to brief this matter upon the merits.

RESPECTFULLY SUBMITTED,

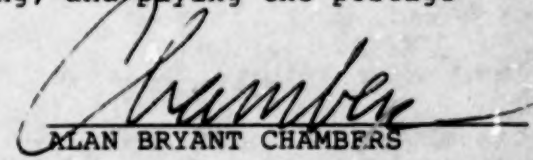


ALAN BRYANT CHAMBERS
Attorney for Petitioner
147 Jefferson Avenue
Suite 1206
Memphis, Tennessee 38103-2218
901-525-4297

N. ALAN LUBIN
Attorney for Petitioner
140 Jefferson Avenue
Memphis, Tennessee 38103
901-525-4284

CERTIFICATE OF SERVICE ON COUNSEL

I, Alan B. Chambers, Attorney for Petitioner, hereby certify that on the ___ day of December, 1983, I mailed three copies of the foregoing Petition for Writ of Certiorari to Mr. James A. Johnson, Jr., Attorney at Law, P. O. Box 768, West Memphis, Arkansas, 72301 and to Mr. J. C. Deacon, Attorney at Law, P. O. Box 1245, Jonesboro, Arkansas 72401, by placing said copies in the hands of employees of the U. S. Postal Service for mailing, and paying the postage thereon.



ALAN BRYANT CHAMBERS

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

MILTON LUBIN, M.D. PLAINTIFF

VS. No. J C 81 292

CRITTENDEN HOSPITAL ASSOCIATION, A CORPORATION; R. F. SCRUGGS; HUGH V. CHALMERS; J F. RIEVES, JR.; H. G. LANFORD, M.D.; E. W. BIGGER, JR.; JOHN H. GOE; RALPH HILL; C. E. MORRISON, JR.; SAM C. HUDSON; N. S. SECHREST; BILLY WOOD; AND MRS. MARY ARNOLD DEFENDANTS

FILED

Sept. 20, 1982

CARL R. BRENTS, Clerk

ORDER

Plaintiff brought this action against the members of the Crittenden Hospital Association's Board of Trustees and the Hospital itself alleging that the Board, after a hearing, placed Plaintiff on "probation" for one year with regard to his medical staff privileges at the Hospital in violation of rights secured to him by the Constitution of the United States. Plaintiff contends this Court has jurisdiction based on 42 U.S.C. Section 1983 in connection with 28 U.S.C. Section 1343(3) because the

actions of Defendants deprived him of due process of law. Defendants have moved for dismissal on the ground that the Court lacks subject matter jurisdiction because no state action is involved.

The question of whether this Court has jurisdiction of the case under 42 U.S.C. §1983 depends on whether the action of Defendants, in placing Plaintiff on probation, was state action or whether it was purely private. If it was the latter, then §1983 affords no basis for federal jurisdiction. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

It is undisputed that Crittenden Hospital Association is a private, non-profit corporation organized under the laws of Arkansas; it is tax-exempt; it is subject to extensive state regulation; it receives funds disbursed under the provisions of the Hill-Burton Act (42 U.S.C. §291, et seq.), Medicare and Medicaid programs; and it receives other federal and state funds. These facts standing alone, however, are not sufficient to automatically confer "state action" status on the actions of the Defendants. There must also be a "sufficiently close nexus between the state

and the challenged action of the regulated entity so that the action of the latter may be fairly treated as to that of the state itself." Jackson, supra, 419 at 349-50.

Plaintiff has offered nothing to indicate that there was any connection between the action taken by the Defendants in placing Plaintiff on probation and the state's relation to the hospital operation. Briscoe v. Bock, 540 F.2d 392 (1976).

Since this Court has no jurisdiction with respect to the federal claim asserted by Plaintiff, it has no jurisdiction of the pendent state claim alleged in count II of the complaint. United Mine Workers of America v. Gibbs, 383 U.S. 715, (1966).

Defendants' motion to dismiss is granted.

Dated September 17, 1982.

/s/

U. S. DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2272

MILTON LUBIN, M.D., Appellant, v. CRITTENDEN HOSPITAL ASSOCIATION, A CORPORATION, R. F. SCRUGGS, HUGH B. CHALMERS, J. F. RIEVES, JR., H. G. LANFORD, M.D., E. W. BIGGER, JR., C. E. MORRISON, JR., SAM C. HUDSON, N. S. SECHREST, BILLY WOOD, and MRS. MARY ARNOLD, Appellees.	Appeal from the United States District Court for the Eastern District of Arkansas

---

Submitted: June 16, 1983

Filed: August 9, 1983

Before BRIGHT, j. R. GIBSON and FAGG, Circuit Judges

FAGG, Circuit Judge.

Dr. Martin Lubin brought this civil rights action pursuant to 42 U.S.C. §1983 against the Crittenden Hospital Association and its trustees,

alleging that disciplinary action by the Hospital deprived him of due process. The district court held that the hospital's discipline was not state action and dismissed the complaint for lack of subject matter jurisdiction. We affirm.

Lubin is a licensed physician who has been a member of the medical staff of Crittenden Memorial Hospital in West Memphis, Arkansas, since 1953. It is undisputed that the Crittenden Hospital Association is a private, non-profit corporation organized under the laws of the state of Arkansas; it is governed by an eleven member board of trustees; it is tax-exempt; it is located on county land and in a building owned by the county; and it receives funds from a local hospital tax. The Hospital also receives federal funds, including those disbursed under the provisions of the Hill-Burton Act (42 U.S.C. §291, et seq.), and the Medicare and Medicaid programs; and it is subject to extensive governmental regulation as a health care facility. Members of the Hospital's board of trustees are chosen by election in conformity with the Hospital's by-laws

rather than by governmental appointment, and Lubin does not allege that a public official has ever participated as a member of the board.

The Hospital Association notified Lubin by letter that it had appointed a committee to investigate reports of misconduct by him. After the investigation was completed, the Hospital's executive committee determined that Lubin's conduct was"detrimental to the well being of the Hospital" and placed him on probation for one year with respect to his staff privileges. Lubin appealed this decision to the board of trustees which, after holding a hearing, upheld the committee's ruling.

Lubin then filed this action against the Hospital and its trustees alleging in count I that placing on probation for one year violated his federal constitutional rights under the due process law and seeking injunctive relief and damages pursuant to 42 U.S.C. §1983. In count II Lubin sought damages based upon state tort claims and invoked the doctrine of pendent jurisdiction. The Hospital and its trustees moved

to dismiss those counts, asserting that the court lacked subject matter jurisdiction because no state action was involved. The District Court granted the motion to dismiss.

On appeal, Lubin argues that the disciplinary action of the Hospital constituted state action so as to invoke federal jurisdiction pursuant to 42 U.S.C. §1983 in conjunction with 28 U.S.C. §1343(3). It is well established that if the action of the Hospital was a purely private action, then §1983 affords no basis for federal jurisdiction and Lubin's claim was properly dismissed for lack of subject matter jurisdiction. Robinson v. Bergstrom, 579 F.2d 401, 404 (8th Cir. 1978). Further, if the District Court had no jurisdiction with respect to the federal claim asserted by Lubin, it had no jurisdiction over the pendent claims asserted in count II. United Mine Workers of America v. Gibbs, 383 U.S. 715, 722 (1966); Briscoe v. Bock, 540 F.2d 392, 394 (8th Cir., 1976).

In order for the Hospital's discipline of Dr. Lubin to be classified as state action, there must be a sufficiently close nexus between the challenged action of the Hospital and the state's regulation so that the action of the former may be fairly treated as that of the state itself. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). "The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the state is responsible for the specific conduct of which the plaintiff complains." Blum v. Yaretsky, 102 S.Ct. 2777, 2786 (1982) (emphasis in original).

This court applied the nexus test in Briscoe v. Bock, supra, 540 F.2d 392, a case in which a physician was dismissed by a private, non-profit, tax-exempt hospital. Id. at 394. The hospital in question in Briscoe was subject to extensive state regulation and received substantial federal funding. Id. We held that there was "no such nexus between the state's relationship to the Hospital's operation and the

dismissal of the plaintiff as to justify attribution of the challenged action of the Hospital to the state." Id. at 396.

The case presented by Lubin is controlled by our decision in Briscoe. The only distinction between the amount of state regulation in the two cases is the fact that in this instance, the county owns the Hospital's building and land. This factor is not significant because the lease agreement affords "full and complete charge of the management and operation" to the Hospital. Furthermore, Lubin makes no allegation that the State had a responsibility to exert influence over or participate in the Hospital's disciplinary procedures. Thus, we must find that a sufficient nexus does not exist between the State's relationship to the operation of the Hospital and the Hospital's discipline of Lubin to establish jurisdiction, because the state was not regulating or controlling the activity from which Lubin's complaint arises.

Lubin argues that if the nexus test fails to establish that the requisite state action was present, alternative tests finding a symbiotic relationship or a public function will indicate that the Board's activities constitute state action. We disagree. Use of the symbiotic relationship test is limited generally to cases involving racial discrimination. See Briscoe v. Bock, supra, 540 F.2d at 396, n.3. The public function approach goes to cases where an entity is exercising power traditionally reserved exclusively to the state. Rendell-Baker v. Kohn, 102 S.Ct. 2754, 2764, 2772 (1982); Schlein v. Milford Hospital, Inc., 561 F.2d 427, 429 (2d Cir. 1977). Therefore, we find these tests inapplicable to the present case.

Virtually every circuit that has considered substantially similar claims involving disciplinary actions by private hospitals has reached the same conclusion as Briscoe. See, e.g., Loh-Seng Yo v. Cibola General Hospital, 706 F.2d 306, 308 (10th Cir. 1983); Modaber v. Culpepper Memorial Hospital, Inc., 674 F.2d 1023, 1026

(4th Cir. 1982); Musso v. Suriano, 586 F.2d 59, 62-63 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979); Madry v. Sorel, 558 F.2d 303, 305-06 (5th Cir. 1977), cert. denied, 434 U.S. 1086 (1978). The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2272	)	September Term 1983
	)	
	)	
Milton Lubin, M.D.,	)	
	)	
Appellant,	)	
	)	Appeal from the United
vs.	)	States District Court
	)	for the Eastern District
Crittenden Hospital Assn., etc., et al,	)	of Arkansas
	)	
Appellees.	)	
	)	

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

September 16, 1983

APPENDIX D

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

§ 1. Citizenship - Due process of law - Equal protection. - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

APPENDIX E

28 U.S.C. §1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX F

42 U.S.C. §1343(3)

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his personal property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in §1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in §1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution by any Act of Congress providing for the equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

NO. 83-969

In The

Supreme Court of the United States

October Term, 1983

MILTON LUBIN,

Petitioner,

vs.

CRITTENDEN HOSPITAL ASSOCIATION, A Corporation; R. F. SCRUGGS; HUGH B. CHALMERS; J. F. RIEVES, JR.; H. G. LANFORD, M.D.; E. W. BIGGER, JR.; JOHN H. GOE; RALPH HILL; C. E. MORRISON, JR.; SAM C. HUDSON; N. S. SECHREST; BILLY WOOD; and, MRS. MARY ARNOLD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAMES A. JOHNSON, JR.
Spears, Sloan & Johnson
P. O. Box 768
West Memphis, AR 72301
501-735-3270

J. C. DEACON
Barrett, Wheatley, Smith & Deacon
P. O. Box 4057
Jonesboro, AR 72403-4057
501-932-6694

Attorneys for Respondents

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

Should this Court review a decision of the United States Court of Appeals for the Eighth Circuit affirming that the District Court had no jurisdiction under 42 U.S.C. § 1983 because the imposition of a probationary period upon a Caucasian staff physician by a private hospital association was not state action?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

NO. 83-969

In The

Supreme Court of the United States

October Term, 1983

MILTON LUBIN,

Petitioner,

vs.

CRITTENDEN HOSPITAL ASSOCIATION, A Corporation; R. F. SCRUGGS; HUGH B. CHALMERS; J. F. RIEVES, JR.; H. G. LANFORD, M.D.; E. W. BIGGER, JR.; JOHN H. GOE; RALPH HILL; C. E. MORRISON, JR.; SAM C. HUDSON; N. S. SECHREST; BILLY WOOD; and, MRS. MARY ARNOLD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Crittenden Hospital Association, et al (hereinafter "Crittenden Hospital" or "respondents") respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and

opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

Contrary to the statement of Petitioner, the opinion of the Eighth Circuit is reported as *Lubin v. Crittenden Hospital Association,* 713 F.2d 414 (1983); it is reproduced at Appendix B-3 through B-10 of the Petition. The opinion of the United States District Court for the Eastern District of Arkansas has not been reported; it is reproduced at Appendix A-1 through A-2 (sic) of the Petition.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

Petitioner requests that this Court issue a Writ of Certiorari based on Rule 17(a) and (c). An examination of the alleged reasons for review shows clearly that the Eighth Circuit opinion is not in conflict with decisions either of this Court or the other Circuits.

I. The Opinion Below Is Not In Conflict With Applicable Decisions Of This Court.

Although Petitioner claims that he is invoking Rule 17(c) and says that the Eighth Circuit decided a most important question of Federal Law which should be settled by this Court (Petition, p. 13), he then ignores that assertion and proceeds to argue that, in fact, the Eighth Circuit opinion decided a federal question in a way that is in conflict with applicable decisions of this Court. (Petition, p. 15). Quite to the contrary, the opinion is in accord with the decisions of this Court and the opinion relied upon such precedents in affirming the District Court.

Petitioner first admits that the Eighth Circuit opinion followed *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), in finding that there was not a sufficiently close nexus between the challenged action of the Hospital and the state's regulation of the institution. (Petition, p. 15).

He then goes on to suggest that if the Eighth Circuit had followed *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), "it would have easily found that a symbiotic relationship existed between the Respondents and government sufficient to provide a basis for finding State Action." He further criticizes the Eighth Circuit for commenting in its opinion that the "use of the symbiotic relationship test is limited generally to cases involving racial discrimination." (Petition, p. 15).

Burton did involve racial discrimination and the case at bar does not. Other courts have also noted that the doctrine of state action in racial discrimination cases was necessarily broadly drawn in order to implement Congressional intent. See Footnote 3, *Briscoe v. Bock*, 540 F.2d 392, 396 (8th Cir. 1976); *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir.), cert. den., 423 U.S. 1000 (1975).

The absence of racial discrimination is not the only significant factual distinction between *Burton* and the medical privileges probationary action taken by Crittenden Hospital against Dr. Lubin. Even though there was the usual state and federal regulation of health care and participation in Medicare and Medicaid programs, as well as local government ownership of the land and building, the court observed that "the lease agreement affords full and complete charge of the management and operation to the Hospital."

In *Burton* the parking authority profited from the admitted racial discrimination of the restaurant and the parking authority became a joint participant and thus responsible for the discrimination because of the manner in which it leased the public property. 365 U.S. at 726.

Jackson pointedly limited *Burton* to its specific facts, just as Justice Clark, 13 years before, had suggested should be the case. 419 U.S. at 358.

In the last two years this Court has measured two separate fact situations in light of the symbiotic relationship presented in *Burton*, and rejected the contention as a basis for state action. *Rendall-Baker v. Kohn*, — U.S. —, 102 S. Ct. 2764 (1982); *Blum v. Yaretsky*, — U.S. —, 102 S. Ct. 2777 (1982). The *Blum* court recited the litany of alleged state involvement and regulation, pointed out that the State was not responsible for the decisions challenged, held that the challenged activities "do not fall within the ambit of *Burton*", and bottomed its decision on *Jackson*.

The Eighth Circuit correctly decided the question presented in this case in keeping with principles set forth in prior, applicable decisions of this Court. Petitioner has not, and cannot, demonstrate that the decision of the

Eighth Circuit conflicts in any way with an opinion of this Court so as to justify review by certiorari.

II. The Eighth Circuit's Decision Is Not In Conflict With Decisions Of Any Other Federal Courts Of Appeal

Petitioner claims that the Eighth Circuit decision, which was in accord with the Fourth, Fifth, Seventh and Tenth Circuits, is in conflict with the Third and Sixth Circuits. (Petition, p. 16). A review of the current decisions of those two circuits demonstrates that petitioner is in error.

The Third Circuit

Petitioner says that *Chalfont v. Wilmington Institute,* 574 F.2d 739 (3rd Cir. 1978) is in conflict but neither discusses the case nor gives any reasons for the claim. (Petition, p. 16). This is perhaps because *Chalfont* involved a discharged employee of a public library and thus the court was presented with a different issue.

The Third Circuit by its decision three months later in *Hodge v. Paoli Memorial Hospital,* 576 F.2d 563 (1978) did consider revocation of the staff privileges of a physician in a private hospital and, with similar facts before it, concluded that the receipt of federal funds and state regulation did not constitute state action under 42 U.S.C. § 1983. It listed the Eighth Circuit decision of *Briscoe v. Bock,* 540 F.2d 392 (1976) as one of the circuits holding to a similar view.

The Sixth Circuit

Petitioner points to *O'Neill v. Grayson County War Memorial Hospital,* 472 F.2d 1140 (6th Cir. 1973) to support his assertion that the Sixth Circuit is in conflict with the Eighth and other Circuits. *O'Neill* was decided a year

before this Court's 1974 decision in *Jackson v. Metropolitan Edison Co., supra,* which formulated the nexus test on which the Eighth Circuit relied in *Briscoe* and in the instant case.

The Sixth Circuit in *Jackson v. Norton Children's Hospitals, Inc.,* 487 F.2d 502 (6th Cir. 1973), cert. den. 416 U.S. 1000 (1974) where a physician claimed a § 1983 violation against a private hospital, found that the revocation of staff privileges did not constitute state action.

Again in 1980, the Sixth Circuit, considering the principles of both *Burton* and *Jackson,* found no symbiotic relationship and an insufficiently close nexus to constitute state action. *Griffith v. Bell-Whitley Com. Action Agency,* 614 F.2d 1102 (6th Cir.), cert. den. 447 U.S. 928 (1980). See also *Newsom v. Vanderbilt University,* 653 F.2d 1100 (6th Cir. 1981).

It, therefore, seems clear that the Sixth Circuit is following the same guidelines and mandates of this Court as the Eighth Circuit and that there is no conflict which justifies review by certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

James A. Johnson, Jr.
Spears, Sloan & Johnson
P. O. Box 768
West Memphis, AR 72301
501-735-3270

J. C. Deacon
Barrett, Wheatley, Smith & Deacon
P. O. Box 4057
Jonesboro, AR 72403-4057
501-932-6694

Attorneys for Respondents